

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554

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In the Matter of	)	
	)	
Telecommunications Services	)	CS Docket No. 95-184
Inside Wiring	)	
	)	
Customer Premises Equipment	)	
	)	
	)	
In the Matter of	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	MM Docket No. 92-260
and Competition Act of 1992:	)	
	)	
Cable Home Wiring	)	

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Reply Comments of CableVision Communications, Inc.,  
Comcast Cable Communications, Inc.  
And Tele-Media Corporation of Delaware  
on the Second Further Notice of Proposed Rulemaking

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March 2, 1998

Pursuant to 47 C.F.R. §§ 1.415, 1.419, CableVision Communications, Inc., Comcast Cable Communications, Inc. and Tele-Media Corporation of Delaware, through their attorneys, file the following reply comments in the above-captioned proceeding.

***I. Parties***

CableVision Communications, Inc. (hereinafter "CableVision"), Comcast Cable Communications, Inc. (hereinafter "Comcast"), and Tele-Media Corporation of Delaware (hereinafter "Tele-Media") are multiple system managers of cable systems throughout the United States. CableVision, Comcast and Tele-Media (sometimes collectively referred to as the "Cable Operators"), as providers of multichannel video services, have a great interest in providing service to subscribers within MDUs and will be affected by the outcome of this proceeding.

***II. Introduction***

No justification exists to treat an MVPD differently based on the legal classification of the service or based on the transmitting technology used. Thus, any rule promulgated by the Commission must apply equally to franchised cable operators and all other alternative providers of video programming services. The comments advocating special exceptions for alternative providers offer no evidence to support their argument that alternative providers should be treated any differently than cable operators when it comes to exclusivity regulations. Moreover, there have been and certainly will continue to be situations where the alternative provider is the incumbent operator and the franchised operator is the new entrant into the MDU.

If the goal of the cable home wiring rules is to increase "consumer choice"<sup>1</sup>, meaning allowing the end-user, the person actually watching the video programming, to have the choice of which MVPD provides the service, then neither permitting MVPDs to enter into exclusive contracts nor the building-by-building disposition of cable home wiring as set forth in the Commission's Report and Order dated October 17, 1997 will accomplish that goal.<sup>2</sup> No evidence at all has been presented in this proceeding to support the argument of any commenting party that the Commission's goal of increasing consumer choice will be met by the rules promulgated by the Commission during this proceeding. Consequently, because these proposals will not accomplish the goal mandated by Congress, the Commission will act beyond its statutory authority in enacting these Rules.

A review of the various comments submitted to the Commission reveals that many of the commenting parties agree that whatever the Commission's final rules are they should apply equally to all MVPDs. See Winstar Communications, Inc. ("Winstar") at 10; Community Associations Institute ("CAI") at 7; Ameritech New Media, Inc. ("Ameritech") at 12; RCN Telecom Services, Inc. ("RCN") at 7; National Cable Telecommunications Association ("NCTA") at 5; Cable Telecommunications Association ("CATA") at 4-5; Cox Communications, Inc. ("Cox") at 9; Time Warner Cable at 12-14; U.S. West, Inc. at 7-8. Additionally, several MVPDs stated that "*efficient* new entrants will continue to attract financing, and to install new facilities in MDUs in return for the undisturbed right to provide

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<sup>1</sup> *Report and Order*, MM Docket 92-260, dated October 17, 1997 (hereinafter cited as "*Oct. Report and Order*") at ¶ 35 (footnote omitted).

<sup>2</sup> See Comments of Cablevision, Classic and Comcast, dated September 25, 1997 at 13-20; Reply Comments of Cablevision, Classic and Comcast, dated October 6, 1997 at 5-7.

*nonexclusive service to MDU tenants.” Ameritech at 6 (emphasis added and in original); see also Winstar at 9.*

### ***III. Reasonable Length of Exclusivity Period***

The Cable Operators suggested in their Comment that five years is a reasonable and appropriate period of time for an MVPD to recoup its specific capital cost of providing service to a particular MDU. Many of the commenting parties in this proceeding agree. Media Access Project and Consumer Federation of America (“MAP/CFA”) at 4-5; Cox at 8; RCN at 3; Bell Atlantic at 2. Of course, the MVPD could enter into a longer exclusive service contract, as long as it was prepared to present evidence to an independent expert showing that the longer time period is necessary to recoup its specific investment at that particular MDU. See *also* Bell Atlantic at 4 (“the MVPD would need to show extraordinary circumstances that require a longer period for cost recovery.”) Further, the Cable Operators suggested that after the exclusivity period is complete, that MVPD should be prohibited from entering into another exclusive service contract with that MDU owner unless a major upgrade or other significant investment of the facilities is necessary because of the age and/or condition of the facilities and/or the addition of new technology. See *also* RCN at 6.

However, some of the commenting parties (mostly alternative providers) suggest that an exclusive time period of much more than five years is *needed*. For instance, OpTel, Inc. believes that a fifteen (15) year cap would give better effect to the Commission’s goal of promoting entry and encouraging development of competition in the MVPD marketplace. OpTel at 1; ICTA at 4-5.<sup>3</sup> ICTA argues that exclusive contracts “do

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<sup>3</sup>Comcast is aware of an MVPD in Little Rock, Arkansas, American Telecasting, Inc.  
(continued...)

not prevent a provider from entering the geographic market as a whole and competing at the property line.” ICTA at 5. ICTA’s argument ignores the well stated objective of this proceeding to increase individual consumer choice, and only provides a benefit to the property owner and the alternate provider obtaining the long-term exclusive contract; clearly contrary to Congressional mandate.

In support of its contention that long-term exclusive contracts are necessary, and in opposition to the Commission’s efforts towards promoting competition in the marketplace by limiting the term of exclusive contracts between MVPDs and MDUs, OpTel argues that a seven-year cap on exclusive agreements makes it impossible for an MVPD to recover system installation costs and earn an adequate return on investment. The backbone of its argument is a financial analysis prepared by OpTel’s own treasurer. The Commission should disregard the financial analysis provided by OpTel in support of its Comment because it is inherently biased due to lack of independence, it relies substantially on exaggerated assumptions, and it utilizes faulty reasoning throughout.

The numbers used in the calculation of initial investment required to service a typical MDU of 300 units are grossly overstated. Industry experts take opposition to each number used in the computation. For example, wiring and distribution costs typically range from a low of \$50 per unit (pre-wire) to a high of \$150 per unit (post-wire). OpTel estimates that \$250 is a fair number to use as an average, which is an inflated number

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<sup>3</sup>(...continued)

(“ATI”), that has told a state court that it “need[s] to have exclusive access to the properties they serve for *some limited period of time* to ensure that they will recoup their investment.” (emphasis added) (a copy of this portion of the pleading was attached to the Cable Operators’ Comment as Exhibit A). ATI’s exclusive service contract with that MDU owner is for only five (5) years.

even if all buildings necessitated a post-wire installation. Similarly, the stated costs for microwave receivers, addressable converter boxes, and the distribution network are likely inflated as these costs are provided by OpTel in support of its position without any supporting details (i.e. model numbers, type, source of cost information, etc.).

OpTel's analysis is also weak in the assumptions made to support its argument. First, the 60% cable penetration rate utilized in the report is considered below average in today's MDU marketplace. Second, a terminal multiple of 7 is used in computing cash flow because, according to OpTel, this is indicative of the typical terminal multiple employed in the evaluation of hardwire cable systems today. That is a poor assumption on which to base cash flow analysis since OpTel is not considered a hardwire system. Further, hardwire systems rely on terminal multiples in the range of 9-11. Of course, it is in the interest of OpTel's argument to use a lower multiple and thus understate expected cash flows from the investment.

The OpTel report is further flawed through its extensive use of flawed reasoning. Perhaps most significant is the comparison of post-tax rates of return calculated in the report with pre-tax rates of return found in other markets. OpTel's analysis is a classic case of comparing apples with oranges and is a hidden strategy that taints OpTel's conclusions. Another pitfall in the line of reasoning implemented in the response is the mentioning that no consideration is made for the time value of money. Anytime this consideration surfaces it is important to be sure that each aspect of the report has been similarly restated to correct for inflation. If such an undertaking is desired, what are the appropriate discount rates and rates of inflation to be used? Because the proper

calculations are missing, the time value concept in OpTel's report only serves to mislead and should be disregarded.

In summary, OpTel makes an argument which falls on the weight of its overstated cost estimates, improper assumptions, and poor reasoning. Even utilizing OpTel's own numbers, if a company can only return 7.2% in the best case scenario (10-year contract limit, 75% chance of renewal), then why should anyone invest any money when it claims 16.7% is offered on similarly risky ventures? Apparently, OpTel feels that the purpose of this proceeding is for the Commission to protect inefficient market participants, not strive for increased consumer choice.

The Commission requested comment on whether an MDU owner should be afforded an opportunity to terminate existing exclusive service contracts and retain the inside wiring in exchange for a payment to the provider, compensating it for unrecovered investment costs. The Cable Operators assert that the only time that anyone should be permitted to terminate a contract is under the specific provisions of the contract or in case of breach by one of the parties to the contract. Once a party, such as an MDU owner, enters into a contract, it should not be given the opportunity to terminate the contract. The Cable Operators and many of the commenting parties asserted that the Commission must honor the integrity of existing contracts that were negotiated in the market at arm's length.

#### ***IV. "Fresh Look" at Existing "Perpetual" Exclusive Service Contracts***

The Commission requested comment on whether there should be different treatment accorded existing service contracts versus future service contracts. The Commission should determine that any exclusive service contract in existence for more than five (5)

years<sup>4</sup> should no longer provide for exclusivity. However, this declaration should not affect the length of the contract for access to the premises. Consequently, in the scenario in which an MVPD has a 15 year exclusive contract for a certain MDU that has been in existence for seven years, the exclusivity provision of the service contract becomes void<sup>5</sup> but the service contract itself does not terminate. Thus, the MVPD would be able, in accordance with its service contract with the MDU owner, to continue to have access to the tenants of the MDU in order to provide multichannel video programming services to the residents of that MDU, even over the objection of the MDU owner.

OpTel, though, argues for "fresh look" to apply to any perpetual contract,<sup>6</sup> whether exclusive or not. However, OpTel's comments go well beyond what the Commission sought concerning "perpetual exclusive contracts". Oct. Report and Order at ¶ 264. Thus, OpTel's entire discussion concerning perpetual contracts is off base and fails to answer the question asked by the Commission. As a party favoring long-term exclusive contracts with MDU owners, OpTel naturally desires to have the Commission terminate any alleged

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<sup>4</sup> Five years should allow the MVPD to recoup its specific, capital investment for the MDU, unless in exceptional cases where it can show it required a longer period of time to recoup its capital investment. Bell Atlantic agrees with the Cable Operators' position on this issue. Bell Atlantic at 4-5. However, Bell Atlantic is not entirely clear as to whether only the exclusivity provision or the entire contract should be canceled. If the incumbent MVPD believes that an exceptional situation does exist, and the MDU owner desires to allow another MVPD to provide service to any resident who so desires to receive that new MVPD's service, the incumbent would have the same right to go to an arbitrator to establish an exclusivity period of more than five years.

<sup>5</sup> This automatic termination of only the exclusivity provision of the contract, but not the access to the premises provision of a contract between an MVPD and MDU owner moots the need for a certain period, such as 180 days, to allow the MDU owner to act on the "fresh look" concept for "perpetual exclusive contracts."

<sup>6</sup> OpTel argues, without any evidence at all, that "the record in this proceeding amply demonstrates that the current market for MVPD services is being skewed by the existence of perpetual, or *defacto*, perpetual contracts." OpTel at 2.

perpetual contract, even if nonexclusive, that allows another MVPD access to an MDU and the consumers therein.

Several of the comments discuss the merits of various "windows" during which an owner can take a "fresh look" at a perpetual exclusive contract. These "windows" vary from 180 days to 36 months. However, several of the commenting parties recognize the inherent problems in setting a fixed "window." For instance, the Building Owners and Managers Association International, et al. ("Building Owners"), the commenting party most directly affected by this particular issue in this proceeding, argue that no "fresh look" is needed and assert that the market should be allowed to run its course. Building Owners at 7-8. The Commission should seriously consider the Building Owners' comments since they represent the party in the contractual relationship that would be permitted the "fresh look".

Ameritech, on the other hand, advocates that the "fresh look window" will "spawn litigation over whether, in a given case, the fresh look window has been triggered or expired." Ameritech at 8. The Cable Operators agree with Ameritech's position on this issue, and have put forth a recommendation, like Bell Atlantic, that does not require the setting of a window for a particular time period. Moreover, the Cable Operators' suggestion that the "fresh look" apply only to the exclusivity provision and not the contract as a whole, supports the Congressional mandate that the choice of MVPDs for the consumer be increased as a result of this proceeding. The "fresh look" should not be a method to allow an MDU owner, at the bequest of an alternative provider, to kick out and exclude an incumbent MVPD in order to grant the alternative provider exclusive access to

the consumers within the MDU. To the contrary, the "fresh look" should encourage MDU owners to provide their tenants increased choice between various MVPDs.

#### **V. *Forum***

The forum for determining any disputes concerning the entry and/or enforceability of an exclusive service contract remains a critical issue. The most appropriate forum is arbitration in the county in which the MDU is located. Cable Operators' Comment at 6-7. No commenting party has provided the Commission with any other suggestion or alternative to the Cable Operators' proposal. Consequently, the Commission should adopt said proposal.

#### **VI. *Standing to Challenge***

This issue was not extensively discussed in any other party's comments. Thus, the Commission should seriously consider implementing the Cable Operators' proposals on this issue. Cable Operators' Comments at 7-8.

#### **VII. *Limitations Period***

Once again, the Cable Operators note that the Commission should seriously consider implementing their proposed limitations period since no other commenting party addressed this issue. Cable Operators' Comments at 8-9.

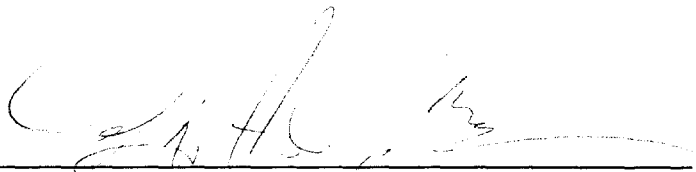
#### **VIII. *Constitutional, statutory or common law implications***

In addition to reasserting its comments concerning this significant issue in the *Further Notice*, (see Cable Operators' Comment at 9-10), the Cable Operators agree with the legal arguments asserted by other commenting parties that the Commission does not have the statutory authority to interfere with existing contractual relationships. See, e.g., Cox at 4; NCTA at 2-4; Tele-Communications, Inc. at 5-18; Time Warner at 4-12.

## **IX. Conclusion**

However the FCC settles the conflicting issues presented by the comments in this proceeding, the Commission must not lose sight of the primary goal of providing greater choice for the individual consumer. The Cable Operators believe that the rules suggested in their Comment and this Reply Comment will achieve this important goal. Furthermore, for MDU subscribers to receive the greatest choice possible, these proposed Rules **must** be uniform and apply to **all** MVPDs providing service to MDUs.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Terry S. Bienstock", is written over a horizontal line.

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